

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DONALD LYLE STRATTON,

Plaintiff,

v.

JULIE BUCK, et al.,

Defendants.

No. C09-5571 RJB/KLS

REPORT AND RECOMMENDATION

Noted for: July 23, 2010

Presently before the court is Defendant Dale Brown's motion to dismiss¹ this action for failure to state a claim for relief pursuant to Fed. R. Civ. P. 12(c). Dkt. 25. Defendant Brown moves to dismiss Plaintiff Donald Lyle Stratton's complaint because he has failed to exhaust his administrative remedies. *Id.* Defendant Brown also moves to dismiss Mr. Stratton's complaint for failure to state an Eighth Amendment violation for which relief may be granted under 42 U.S.C. § 1983. *Id.* Mr. Stratton filed a response (Dkt. 35) and Defendant Brown filed a reply. Dkt. 39.²

¹ The other named defendant, Julie Buck, filed a motion for summary judgment on the claims asserted against her. Dkt. 23. A separate Report and Recommendation on that motion is pending. Dkt. 40.

² Defendants request that Plaintiff's response to the motion to dismiss (Dkt. 35) be stricken because it was filed on May 13, 2010 instead of May 10, 2010 as ordered. Dkt. 39 (citing Order granting Motion for Extension at Dkt. 31). The court received Plaintiff's response on May 13, 2010, but the response includes a certificate of mailing signed by Plaintiff on May 3, 2010. Dkt. 35, p. 10. Absent proof to the contrary, the court views the response as having been filed on the date Plaintiff signed it. *Houston v. Lack*, 487 U.S. 266, 276, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988); *Schroeder v. McDonald*, 55 F.3d 454, 459 (9th Cir.1995) (applying prison mailbox rule to prisoners like plaintiff, who represent themselves in civil rights litigation).

1 For the reasons stated below, the court recommends that the motion to dismiss be granted
2 because Mr. Stratton failed to exhaust his administrative remedies.³ For this reason, Defendant
3 Brown's alternate grounds for dismissal are not reached.

4 *BACKGROUND*

5 On August 17, 2008, Mr. Stratton was assaulted by a fellow inmate at the Stafford Creek
6 Corrections Center (SCCC). Dkt. 8, pp. 2-3. Mr. Stratton was taken to segregation for
7 involuntary protective custody after the attack. *Id.*, p. 3. After he was placed in a holding cell,
8 Defendant Brown, a Registered Nurse at SCCC, saw Mr. Stratton lying on the floor and she
9 asked Mr. Stratton, "what hurts, what happened, are you in pain, why were you assaulted . . . ?"
10 *Id.*, p. 3, ¶ 14. Thereafter, he was transported by the Aberdeen Fire Department to the Grays
11 Harbor Community Hospital Emergency Department where he was given two CT scans and
12 returned to SCCC. *Id.*, pp. 3-4.

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14 Mr. Stratton alleges that Defendant Brown violated his Eighth Amendment right to be
15 free from cruel and unusual punishment and Fourteenth Amendment right to due process,
16 because she failed to provide Mr. Stratton with pain medications. *Id.*, p. 4, ¶ 28.

17 *STANDARD OF REVIEW*

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19 In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6), all factual
20 allegations set forth in the complaint are "taken as true." *Epstein v. Washington Energy Co.*, 83
21 F.3d 1136, 1140 (9th Cir.1996). Rule 8(a) (2) of the Federal Rules of Civil Procedure "requires
22 only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in
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25 ³ Plaintiff also seeks leave to amend his complaint and to add additional parties. Dkts. 34 and 36. However, neither
26 of these motions need be considered by the court in determining whether Plaintiff has exhausted his administrative
remedies. In light of the finding that Plaintiff has failed to exhaust, the undersigned recommends that the motions to
amend and for permissive joinder (Dkts. 34 and 36) be denied.

1 order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it
 2 rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S.Ct. 1955, 1964, 167
 3 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80
 4 (1957)). To survive dismissal for failure to state a claim, a complaint must contain more than “a
 5 formulaic recitation of the elements of a cause of action;” it must contain factual allegations
 6 sufficient “to raise a right to relief above the speculative level.” *Bell Atlantic*, 127 S.Ct. at 1965.
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8 *DISCUSSION*

9 *A. Exhaustion of Remedies - Standard of Review*

10 Pursuant to the Prison Litigation Reform Act of 1995 (PLRA),⁴ a prisoner is required to
 11 exhaust all of his administrative remedies within the prison system before he can bring a civil
 12 rights lawsuit challenging the conditions of his confinement. 42 U.S.C. § 1997e (a). “Proper”
 13 exhaustion of administrative remedies is required, meaning that “a prisoner must complete the
 14 administrative review process in accordance with the applicable procedural rules, including
 15 deadlines, as a precondition to bringing suit in federal court.” *Woodford v. Ngo*, 548 U.S. 81, 88,
 16 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006). “There is no question that exhaustion is mandatory
 17 under the PLRA and that unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549
 18 U.S. 199, 211, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007). The important policy concern behind
 19 requiring exhaustion is that it “allows prison officials an opportunity to resolve disputes
 20 concerning the exercise of their responsibilities before being hauled into court.” *Id.* at 204.
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 23 Where there is a prison grievance system, prisoners must take advantage of it before
 24 filing a civil rights complaint. *Woodford v. Ngo*, 548 U.S. at 103. In *Woodford v. Ngo*, the
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26 ⁴ 110 Stat. 1321-71, as amended, 42 U.S.C. § 1997e, et seq.

1 prisoner filed his grievance within six months of the incident at issue, rather than within fifteen
2 days as required by the California prison grievance system. *Id.* at 86-87. The Supreme Court
3 rejected the Ninth Circuit's determination that the prisoner "had exhausted administrative
4 remedies simply because no such remedies remained available to him." *Id.* at 87.

5 Failure to exhaust remedies is an affirmative defense that should be brought as an
6 unenumerated Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003); *see*
7 *also Jensen v. Knowles*, 621 F.Supp.2d 921 (E.D.Cal. 2008). Therefore, the Court will consider
8 Defendants' motion as a motion to dismiss, rather than a motion for summary judgment on the
9 merits. In deciding a motion to dismiss for failure to exhaust administrative remedies, a court
10 may look beyond the pleadings and decide disputed issues of fact. *Wyatt*, at 1119-20.
11 Defendants bear the burden of proving failure to exhaust. *Brown v. Valoff*, 422 F.3d 926, 936
12 (9th Cir. 2005). The proper remedy, where a prisoner has failed to exhaust non-judicial
13 remedies, is dismissal of the claim without prejudice. *Wyatt*, 315 F.3d at 1120.

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16 *B. DOC Grievance Process*

17 Ron Frederick is the Grievance Program Manager in the Office of Correctional
18 Operations, Washington State Department of Corrections (DOC). Dkt. 25-2, p. 2. According to
19 Mr. Frederick, the Washington Offender Grievance Program (OGP) has been in existence since
20 the early 1980's and was implemented on a Department-wide basis in 1985. *Id.* ¶ 3. Under
21 Washington's OGP, an offender may file a grievance over a wide range of aspects of his/her
22 incarceration. *Id.* ¶ 4. Inmates may file grievances challenging: 1) DOC institution policies,
23 rules and procedures; 2) the application of such policies, rules and procedures; 3) the lack of
24 policies, rules or procedures that directly affect the living conditions of the offender; 4) the
25 actions of staff and volunteers; 5) the actions of other offenders; 6) retaliation by staff for filing
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grievances; and 7) physical plant conditions. An offender may not file a grievance challenging: 1) state or federal law; 2) court actions and decisions; 3) Indeterminate Sentence Review Board actions and decisions; 4) administrative segregation placement or retention; 5) classification/unit team decisions; 6) transfers; 7) disciplinary actions; and 8) several other aspects of incarceration.

Id. The OGP provides a wide range of remedies available to inmates. *Id.* ¶ 5. These remedies include: 1) restitution of property or funds; 2) correction of records; 3) administrative actions; 4) agreement by department officials to remedy an objectionable condition within a reasonable time; and 5) a change in a local or department policy or procedure. *Id.*

The grievance procedure consists of four levels of review. *Id.* ¶ 6. At Level 0, the complaint or informal level, the offender writes a complaint; the grievance coordinator then pursues informal resolution of the issue, returns the complaint to the offender for additional information, or accepts the complaint and processes it as a formal grievance. *Id.* At Level I, the local grievance coordinator responds to the issues raised by the offender. *Id.* If the offender is not satisfied with the response to his Level I grievance, he may appeal the grievance to Level II. *Id.* All appeals and initial grievances received at Level II are investigated, and the prison superintendent responds to the issues. *Id.* Inmates may appeal all Level II responses to Department headquarters, where they are re-investigated by administrators. *Id.*

C. *Mr. Stratton's Grievances*

On August 21, 2008, Mr. Stratton filed an offender complaint (Grievance Log No. 0820258), stating:

On 8/17/08 at 2005 hours I was assaulted by another inmate and went to the Emergency Room and Trauma Center due to the assault. Officers estimated around 50 punches all to the head. I was not given any type of medication for severe pain in my head and face. I was never told nor asked if I wanted any type of medications from the incident. Not even at the hospital.

1 Now I have recovered fully besides a few bruises. I went 5 days with pain
2 and no medication.

3 Dkt. 25-2, Attach. 8, p. 8 (CM/ECF pagination).

4 On August 29, 2008, the grievance coordinator responded, stating that Mr. Stratton
5 complaint was not a grievable issue and that Mr. Stratton could not “grieve outside entities such
6 as G.H. Hospital.” *Id.*

7 On September 2, 2008, Plaintiff filed another offender complaint essentially rewording
8 the original complaint filed on August 21, 2008. *Id.*, ¶ 11, Attach. B (Grievance Log No.
9 0820716). In this grievance, he stated further that while he was at SCCC, he received no
10 medications from “IMU/SCCC Doctors, or Nurses.” *Id.* He also requested the names and
11 positions of the staff who provided treatment on August 17, 2008 “in medical.” *Id.* He was
12 informed that the issue was found not grievable with Grievance Log No. 0820258), that he
13 cannot cite to RCW’s or law, and that he should rewrite and re-submit his grievance. *Id.*

14 On September 19, 2008, Mr. Stratton sent a letter to the grievance coordinator manager
15 requesting assistance with his grievance. *Id.*, ¶ 12, Attach. C. Attached to Mr. Stratton’s letter is
16 an offender complaint under which Mr. Stratton has written “GC Misconduct.” In it, Mr.
17 Stratton requests that Grievance Log No. 0820528 should be “re-conduct[ed]” because it was
18 found not grievable after he tried to resubmit it. *Id.*, p. 13 (CM/ECF pagination).

19 On October 6, 2008, the Grievance Program Manager, Devon Schrum, responded as
20 follows:

21 You may grieve inadequate medical care. You cannot use third party information
22 such as what the officers think or estimate. You may rewrite and submit through
23 SCCC Coordinators.

24 *Id.*, Attach. D.

1 Five months later on March 13, 2009, Mr. Stratton filed a rewritten offender complaint.
2 *Id.*, ¶ 13, Attach. E (Grievance Log 0820258). In this complaint, Mr. Stratton grieved “SCCC
3 medical for failure to follow policy and procedure.” Dkt. 25-2, Attach. E, p. 18 (CM/ECF
4 pagination).

5 Mr. Stratton was told that he waited too long to rewrite the grievance:

6 Response from HQ was in early Oct. 2008. You have waited 5 months before
7 refilling this. Letter from Ms. Schrum instructed for you to refile & resubmit.

8 *Id.*, Exh. E, p. 18 (CM-ECF numbering).

9 Although the Grievance Program Manager did not explicitly outline the timeframe to
10 rewrite, Ronald Frederick states that the OGP in effect at the time Mr. Stratton initiated his
11 complaints states that the grievant “[s]ubmits the new information / rewrite to the grievance
12 coordinator within five (5) working days of having received the original response.” Dkt. 25-2, ¶
13 14.

15 Mr. Stratton filed this action on September 8, 2008. Dkt. 1.

16 On February 19, 2010, Mr. Stratton sent a letter to the Grievance Program Manager
17 asking for another chance to resubmit his complaints and reopen Grievance #0820258. Dkt. 25-
18 2, ¶ 16, Attach. F. Mr. Stratton was informed that he has shown no good cause for waiting five
19 months to send in the rewrite of his initial complaint and reminded that the OGP states that
20 rewrites are to be submitted within five working days. *Id.*, ¶¶ 16-17, Attach. G.

22 4. *Exceptions to Exhaustion*

23 “If the district court concludes that the prisoner has not exhausted nonjudicial remedies,
24 the proper remedy is dismissal of the claim without prejudice.” *Wyatt v. Terhune*, 315 F.3d
25 1108, 1120 (9th Cir.2003). While the Ninth Circuit has acknowledged the possibility of an
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1 exception to the exhaustion requirement imposed by § 1997e, it has never set forth such an
2 exception. *Id.* at 1120 (“A prisoner's concession to nonexhaustion is a valid ground for
3 dismissal, so long as no exception to exhaustion applies.”). District courts within the Ninth
4 Circuit, along with some circuit courts, “have expressly stated that the common-law exceptions
5 to exhaustion do not apply to § 1997e (a) because the text of the statute itself does not provide
6 for any exceptions[.]” *Bovarie v. Giurbino*, 421 F.Supp.2d 1309, 1314 (S.D. Cal. 2006); accord,
7 *Medina-Claudio v. Rodriguez-Mateo*, 292 F.3d 31, 35 (1st Cir. 2002); *Jackson v. District of*
8 *Columbia*, 254 F.3d 262 (D.C.Cir.2001). This court declines to infer an exception not
9 recognized either by the plain text of the statute or by any decision of the Ninth Circuit.
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11 The court may look beyond the pleadings to determine whether Plaintiff has exhausted
12 his administrative remedies. *Wyatt*, 315 F.3d at 1119-1120. Defendants have produced
13 documents demonstrating that Mr. Stratton did not complete the three-step grievance process for
14 addressing the complaint now at issue. Mr. Stratton does not dispute that he did not complete the
15 established grievance procedure available at SCCC, but argues that he made a good faith effort to
16 file his grievance properly and “appealed it several times.” Dkt. 35, p. 6.
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18 However, the record reflects otherwise. When Mr. Stratton first attempted to grieve his
19 complaint that he was denied medication, his grievance was found non-grievable because it
20 appeared that he was attempting to grieve a private hospital. He was given leave to rewrite. Dkt.
21 25-2, Attach. A. Within five days, he rewrote the grievance, stating that he was not given
22 medication at SCCC and cited to various state and federal statutes and constitutions. He was
23 again advised that his complaint was not grievable because he could not include legal citations.
24 Dkt. 25-2, Attach. B. Instead of rewriting this grievance, he filed a grievance complaining of
25 grievance coordinator misconduct. Dkt. 25-2, Attach. C. On October 6, 2008, he was advised
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1 that he could grieve inadequate medical care, and was given permission to rewrite and re-submit
2 his grievance. *Id.*, Attach. D. He waited over five months to do so. *Id.*, Attach. E.

3 In addition, Mr. Stratton filed this lawsuit several months before he again asked that he
4 be allowed to resubmit his complaints and reopen Grievance No. 0820258. Dkt. 25-2, ¶ 16,
5 Attach. F. Thus, the facts are undisputed that Mr. Stratton did not complete the grievance
6 process before he filed this lawsuit.

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8 “Section 1997e (a) does not say that exhaustion of administrative is required *before* a
9 case may be decided. It says, rather, that “[n]o action *shall be brought* with respect to prison
10 conditions ... until such administrative remedies as are available are exhausted.” “Congress
11 could have written a statute making exhaustion a precondition to judgment, but it did not. The
12 actual statute makes exhaustion a precondition to suit.” *McKinney*, 311 F.3d at 1200 (citing
13 *Perez v. Wis. Dep’t of Corr.*, 182 F.3d 532, 534-535 (7th Cir. 1999) (italics in original).

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15 There is no evidence that Mr. Stratton could not have availed himself of the grievance
16 process and, in fact, he admits that he did not timely file his grievance. This is so even if he felt
17 that his efforts were futile. As noted above, federal courts are not permitted to read futility
18 exceptions into the PLRA exhaustion requirement. *Booth*, 532 U.S. at 741 n. 6. If a court
19 concludes that a prisoner has not exhausted administrative remedies, “the proper remedy is
20 dismissal of the claim without prejudice.” *Wyatt*, 315 F.3d at 1120.

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22 Based on the foregoing, the undersigned concludes that Mr. Stratton is not excused from
23 complying with DOC’s established grievance procedures. The evidence reflects that Mr.
24 Stratton has not yet fully exhausted their administrative remedies. Claims that are not exhausted
25 must be dismissed and this court lacks discretion to resolve those claims on the merits. See e.g.,
26 *McKinney*, 311 F.3d 1198.

1 Accordingly, Defendant Brown's Motion to Dismiss (Dkt. 25) should be **granted** and
2 Plaintiff Stratton's claims should be **dismissed without prejudice**. A dismissal without
3 prejudice may permit the Plaintiff to file a new action upon exhaustion of the prison grievance
4 process.

5 **CONCLUSION**

6 For the reasons stated above the Court should **GRANT** Defendant Brown's motion to
7 dismiss (Dkt. 25) for failure to exhaust and Plaintiff Stratton's claims should be **DISMISSED**
8 **WITHOUT PREJUDICE**.

9 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
10 Procedure, the parties shall have fourteen (14) days from service of this Report and
11 Recommendation to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections
12 will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140
13 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the
14 matter for consideration on **July 23, 2010**, as noted in the caption.
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18 **DATED** this 1st day of July, 2010.

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21 Karen L. Strombom
22 United States Magistrate Judge
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